

minutes, or a transcription of the recording disclosing the identity of each speaker, with the deletions noted in the preceding sentence, will be furnished to any person at the actual cost of duplication or transcription. Requests to inspect or to have copies made of any transcript, electronic recording or set of minutes of any meeting, or any item(s) on the agenda of any meeting, should be made in writing to the General Counsel at the Office of the General Counsel, Occupational Safety and Health Review Commission, Room 941, One Lafayette Centre, 1120–20th Street NW., Washington, DC 20036–3457. The request should identify the time, date, and place of the meeting and briefly describe the items sought. The Commission will maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each closed meeting, or closed portion of a meeting, for a period of at least two years after the meeting, or until one year after the conclusion of any Commission proceeding with respect to which all or part of the meeting was held, whichever occurs later.

[50 FR 51679, Dec. 19, 1985, as amended at 58 FR 26066, Apr. 30, 1993; 73 FR 56492, Sept. 29, 2008]

PART 2204—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN PROCEEDINGS BEFORE THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Subpart A—General Provisions

Sec.

- 2204.101 Purpose of these rules.
- 2204.102 Definitions.
- 2204.103 When the EAJA applies.
- 2204.104 Proceedings covered.
- 2204.105 Eligibility of applicants.
- 2204.106 Standards for awards.
- 2204.107 Allowable fees and expenses.
- 2204.108 Delegation of authority.

Subpart B—Information Required From Applicants

- 2204.201 Contents of application.
- 2204.202 Net worth exhibit.
- 2204.203 Documentation of fees and expenses.

Subpart C—Procedures for Considering Applications

- 2204.301 Filing and service of documents.
- 2204.302 When an application may be filed.
- 2204.303 Answer to application.
- 2204.304 Reply.
- 2204.305 Comments by other parties.
- 2204.306 Settlement.
- 2204.307 Further proceedings.
- 2204.308 Decision.
- 2204.309 Commission review.
- 2204.310 Waiver.
- 2204.311 Payment of award.

AUTHORITY: Sec. 203(a)(1), Pub. L. 96–481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)); Pub. L. 99–80, 99 Stat. 183.

SOURCE: 46 FR 48080, Sept. 30, 1981, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 2204 appear at 62 FR 59569, Nov. 4, 1997.

Subpart A—General Provisions

§ 2204.101 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504, provides for the award of attorney or agent fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called “adversary adjudications”) before the Occupational Safety and Health Review Commission. An eligible party may receive an award when it prevails over the Secretary of Labor, unless the Secretary’s position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards and the procedures and standards that the Commission uses to make awards.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987]

§ 2204.102 Definitions.

For the purposes of this part,

(a) The term *agent* means any person other than an attorney who represents a party in a proceeding before the Commission pursuant to § 2200.22;

(b) The term *Commission* means the Occupational Safety and Health Review Commission;

(c) The term *EAJA* means the Equal Access to Justice Act, 5 U.S.C. 504.

(d) The term *judge* means an administrative law judge appointed by the Commission under 29 U.S.C. 661(j);

(e) The term *OSH Act* means the Occupational Safety and Health Act of 1970, 29 U.S.C. 651-678;

(f) The term *Secretary* means the Secretary of Labor.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987; 74 FR 63988, Dec. 7, 2009]

§ 2204.103 When the EAJA applies.

The EAJA applies to adversary adjudications before the Commission pending or commenced on or after August 5, 1985. The EAJA also applies to adversary adjudications commenced on or before October 1, 1984, and finally disposed of before August 5, 1985, if an application for an award of fees and expenses, as described in subpart B of these rules, has been filed with the Commission within 30 days after August 5, 1985.

[52 FR 5456, Feb. 23, 1987]

§ 2204.104 Proceedings covered.

The EAJA applies to adversary adjudications before the Commission. These are adjudications under 5 U.S.C. 554 and 29 U.S.C. 659(c) in which the position of the Secretary is represented by an attorney or other representative. The types of proceedings covered are the following proceedings under section 10(c), 29 U.S.C. 659(c), of the OSH Act:

(a) Contests of citations, notifications, penalties, or abatement periods by an employer;

(b) Contests of abatement periods by an affected employee or authorized employee representative; and

(c) Petitions for modification of the abatement periods by an employer.

§ 2204.105 Eligibility of applicants.

(a) To be eligible for an award of attorney or agent fees and other expenses under the EAJA, the applicant must be a party to the adversary adjudication. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it satisfies the conditions of eligibility set out in this subpart and subpart B.

(b) The types of eligible applicants are as follows:

(1) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interest, and employs not more than 500 employees;

(2) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(3) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees;

(4) Any other partnership, corporation, association, unit of local government, or public or private organization that has a net worth of not more than \$7 million and employs not more than 500 employees; and

(5) An individual with a net worth of not more than \$2 million.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the notice of contest was filed, or, in the case of a petition for modification of abatement period, the date the petition was received by the Commission under § 2200.37(d).

(d) An applicant who owns an unincorporated business shall be considered as an "individual" rather than a "sole owner of an unincorporated business" only if the issues on which the applicant prevails are related primarily to personal interests rather than business interests.

(e) For the purpose of determining eligibility under the EAJA, the employees of an applicant include all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987; 62 FR 59569, Nov. 4, 1997; 70 FR 22792, May 3, 2005; 74 FR 63988, Dec. 7, 2009]

§ 2204.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses in connection with a proceeding, or in a discrete substantive portion of the proceedings, unless the position of the Secretary was substantially justified.

§ 2204.107

The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of persuasion that an award should not be made to an eligible prevailing applicant because the Secretary's position was substantially justified is on the Secretary.

(b) An award shall be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding. An award shall be denied if special circumstances make an award unjust.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987]

§ 2204.107 Allowable fees and expenses.

(a) Awards shall be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) An award for the fee of an attorney or agent under these rules shall not exceed \$125 per hour, unless the Commission determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for Commission proceedings, justifies a higher fee. An award to compensate an expert witness shall not exceed the highest rate at which the Secretary pays expert witnesses. However, an award may include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Commission shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily perform services;

29 CFR Ch. XX (7–1–11 Edition)

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

[46 FR 48080, Sept. 30, 1981, as amended at 62 FR 35964, July 3, 1997]

§ 2204.108 Delegation of authority.

The Commission delegates to each judge authority to entertain and, subject to § 2204.309, take final action on applications for an award of fees and expenses arising from the OSH Act cases that are assigned to the judge under section 12(j) of the OSH Act, 29 U.S.C. 661(j). However, the Commission retains its right to consider an application for an award of fees and expenses without assignment to a judge or to assign such an application to a judge other than the one to whom the underlying OSH Act case is assigned. When entertaining an application for an award of fees and expenses pursuant to this section, each judge is authorized to take any action that the Commission may take under this part, with the exception of actions provided in §§ 2204.309 and 2204.310.

[46 FR 48080, Sept. 30, 1981, as amended at 74 FR 63988, Dec. 7, 2009]

Subpart B—Information Required From Applicants

§ 2204.201 Contents of application.

(a) An application for an award of fees and expenses under the EAJA shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Secretary that the applicant alleges was not substantially justified. The application also shall state the number of employees of the

applicant and describe briefly the type and purpose of its organization or business.

(b) The application also shall include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants). However, an applicant may omit this statement if :

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application also may include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It also shall contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987]

§ 2204.202 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association shall provide with its application a detailed exhibit showing the net worth of the applicant as of the date specified by § 2204.105(c). The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Commission may require an applicant to file additional information to determine its eligibility for an award.

(b)(1) The net worth exhibit shall be included in the public record of the proceeding except as provided in paragraph (b)(2) of this section.

(2) An applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit in a sealed envelope labeled "Confidential Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on the Secretary but need not be served on any other party to the proceeding. If the Commission finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Commission's procedures under the Freedom of Information Act, part 2201.

§ 2204.203 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Commission may require the applicant to provide vouchers, receipts, or other

§ 2204.301

substantiation for any fees or expenses claimed.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5457, Feb. 23, 1987]

Subpart C—Procedures for Considering Applications

§ 2204.301 Filing and service of documents.

An EAJA application is deemed to be filed only when received by the Commission. In all other respects, an application for an award and any other pleading or document related to an application shall be filed and served on all parties to the proceeding in accordance with §§ 2200.7 and 2200.8, except as provided in § 2204.202(b) for confidential financial information.

[62 FR 35964, July 3, 1997]

§ 2204.302 When an application may be filed.

(a) An application may be filed whenever an applicant has prevailed in a proceeding or in a discrete substantive portion of the proceeding, but in no case later than thirty days after the period for seeking appellate review expires.

(b) If Commission review is sought or directed of a judge's decision as to which an application for a fee award has been filed, proceedings concerning the award of fees shall be stayed until there is a final Commission disposition of the case and the period for seeking review in a court of appeals expires.

(c) If review of a Commission decision, or any item or items contained in that decision, is sought in the court of appeals under section 11 of the OSH Act, 29 U.S.C. 660, an application for an award filed with the Commission with regard to that decision shall be dismissed under 5 U.S.C. 554(c)(1) as to the item or items of which review is sought. If the petition for review in the court of appeals is thereafter withdrawn, the applicant may reinstate its application before the Commission within thirty days of the withdrawal.

[46 FR 48080, Sept. 30, 1981, as amended at 70 FR 22792, May 3, 2005]

29 CFR Ch. XX (7–1–11 Edition)

§ 2204.303 Answer to application.

(a) Within 30 days after service of an application, the Secretary shall file an answer to the application.

(b) If the Secretary and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted upon request.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the Secretary's position. If the answer is based on any alleged facts not already in the record of the proceeding, the Secretary shall include with the answer either supporting affidavits or a request for further proceedings under § 2204.307.

§ 2204.304 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 2204.307.

§ 2204.305 Comments by other parties.

Any party to a proceeding other than the applicant and the Secretary may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Commission determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 2204.306 Settlement.

The applicant and the Secretary may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and the Secretary agree on a proposed

settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 2204.307 Further proceedings.

(a)(1) The determination of an award shall be made on the basis of the record made during the proceeding for which fees and expenses are sought, except as provided in paragraphs (a)(2) and (a)(3) of this section.

(2) On the motion of a party or on the judge's own initiative, the judge may order further proceedings, including discovery and an evidentiary hearing, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses).

(3) If the proceeding for which fees and expenses are sought ended before the Secretary had an opportunity to introduce evidence supporting the citation or notification of proposed penalty (for example, a citation was withdrawn or settled before an evidentiary hearing was held), the Secretary may supplement the record with affidavits or other documentary evidence of substantial justification.

(b) A request that the judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5457, Feb. 23, 1987]

§ 2204.308 Decision.

The preparation and issuance of decision shall be in accordance with § 2200.90. Additionally, the judge's decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the Secretary's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

§ 2204.309 Commission review.

Commission review shall be in accordance with §§ 2200.91 and 2200.92. The applicant, the Secretary, or both may seek review of the judge's decision on the fee application, and the Commission may grant such petitions for review or direct review of the decision on the Commission's own initiative. The Commission delegates to each of its members the authority to order review of a judge's decision concerning a fee application. Whether to review a decision is a matter within the discretion of each member of the Commission. If the Commission does not direct review, the judge's decision on the application shall become a final decision of the Commission 30 days after it is received and docketed by the Executive Secretary of the Commission. If review is directed, the Commission shall issue a final decision on the application or remand the application to the judge for further proceedings.

§ 2204.310 Waiver.

After reasonable notice to the parties, the Commission may waive, for good cause shown, any provision contained in this part as long as the waiver is consistent with the terms and purpose of the EAJA.

§ 2204.311 Payment of award.

An applicant seeking payment of an award shall submit to the officer designated by the Secretary a copy of the Commission's final decision granting the award.

PART 2205—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Sec.

2205.101 Purpose.

2205.102 Application.

2205.103 Definitions.

2205.104–2205.109 [Reserved]

2205.110 Self-evaluation.

2205.111 Notice.

2205.112–2205.129 [Reserved]

2205.130 General prohibitions against discrimination.